

ARKANSAS SUPREME COURT

No. CR 09-302

OSINACHI O. EZIKE
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered June 25, 2009

APPELLEE'S MOTIONS TO DISMISS
APPEAL AND FOR EXTENSION OF
BRIEF TIME [CIRCUIT COURT OF
SALINE COUNTY, CR 2006-778, HON.
GRISHAM A. PHILLIPS, JR., JUDGE]

MOTION TO DISMISS APPEAL
GRANTED; MOTION FOR
EXTENSION OF TIME MOOT.

PER CURIAM

On November 20, 2007, appellant Osinachi O. Ezike entered a negotiated plea of guilty or nolo contendere to internet stalking and received a sentence of thirty-six months' incarceration and forty-eight months' suspended imposition of sentence. Judgment was entered on December 6, 2007. On October 6, 2008, and on November 10, 2008, appellant filed motions in the trial court to vacate the plea. On November 24, 2008, the trial court entered an order that denied the earlier motion. Appellant filed a motion to reconsider in reference to that denial, and on December 18, 2008, the trial court entered an order that denied that motion. Appellant then lodged an appeal of the order denying the motion to reconsider in this court.

The appellee State now brings a motion to dismiss the appeal on the basis of a lack of jurisdiction and a motion that requests an extension of time in which to file appellee's brief in the event that the motion to dismiss is not granted. We grant the motion to dismiss the appeal and the motion for extension of time is therefore moot.

Because appellant's motions to vacate the plea were filed after judgment was entered, the motion considered by the trial court was correctly treated as a petition for postconviction relief under Arkansas Rule of Criminal Procedure 37.1. *See Webb v. State*, 365 Ark. 22, 223 S.W.3d 796 (2006). As a petition under Rule 37.1, the motion was not timely filed.

Where a conviction was obtained on a plea of guilty, Arkansas Rule of Criminal Procedure 37.2(c) provides that the petition for postconviction relief may be filed no later than ninety days after the entry of the judgment. In this case, the petition to vacate was filed 305 days after the judgment was entered. The time limitations imposed in Rule 37.2(c) are jurisdictional in nature, and the circuit court may not grant relief on an untimely petition. *Womack v. State*, 368 Ark. 341, 245 S.W.3d 154 (2006) (per curiam).

An appeal of the denial of postconviction relief will not be permitted to go forward where it is clear that the appellant could not prevail. *Bunch v. State*, 370 Ark. 113, 257 S.W.3d 533 (2007) (per curiam). Here, it is clear that the trial court could not consider the merits of appellant's motion because the motion was an untimely petition under Rule 37.1. The trial court was without jurisdiction to consider appellant's motion to reconsider the order because the motion to vacate the plea was not timely. Accordingly we grant the State's motion and the appeal is dismissed.

Motion to dismiss appeal granted; motion for extension of time moot.